Supreme Court, U.S.
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No. 97-

IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

FIRST VIRGINIA BANK,

Petitioner,

v.

UNITED STATES OF AMERICA AND
U.S. DEPARTMENT OF STATE,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

PETITION FOR WRIT OF CERTIORARI

MARK L. BOOZ
(Counsel of Record)
THOMAS P. JENNINGS
Attorneys for Petitioner
Suite 420
6400 Arlington Boulevard
Falls Church, Virginia 22042
(703) 241-3478

73 pp

QUESTION PRESENTED

When Congress subjects the United States to state courts' writs, can the United States be held responsible for disobedience of the writ in a situation where a private citizen would be responsible?

LIST OF PARTIES

First Virginia Bank was the original plaintiff in this matter and was the appellee before the Court of Appeals. First Virginia Bank is a wholly-owned subsidiary of First Virginia Banks, Inc. First Virginia Bank has no subsidiaries which are not wholly-owned.

Vera Randolph was the original defendant in this matter. She has not participated in this matter since it was before the District Court. Therefore, First Virginia Bank believes she has no interest in the outcome of these proceedings.

The United States, through the Department of State, was Ms. Randolph's employer and became a participant in this matter as a garnishee after First Virginia Bank obtained a judgment against Ms. Randolph. It was the appellant before the Court of Appeals.

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First Virginia Bank respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit in this case.

OPINIONS BELOW

The opinion of the Court of Appeals is reported at 110 F.3d 75 and is reproduced in the appendix hereto ("App.") at 1a. The decision of the District Court in this case is reported at 920 F. Supp. 213 and is reproduced in the Appendix at 13a.

STATEMENT OF JURISDICTION

The judgment of the United States Court of Appeals for the District of Columbia Circuit was entered on April 11, 1997. Petitioner First Virginia Bank filed a timely Suggestion for Rehearing *In Banc* and Petition for Rehearing, which was denied on June 12, 1997. App. 27a-28a. This petition is thus timely pursuant to this Court's Rule 13(3), and this Court has jurisdiction of this matter pursuant to 28 U.S.C. § 1254(1).

STATUTES AND REGULATIONS INVOLVED

The text of the pertinent statutes and regulations are reproduced in the Appendix at 29a-33a.

STATEMENT OF THE CASE

Petitioner First Virginia Bank ("First Virginia") was a creditor of Ms. Vera Randolph, an employee of the United States Department of State. In 1982, First Virginia obtained a judgment against Ms. Randolph in the Superior Court of the District of Columbia, but was to a large degree

unsuccessful in attempts to collect that judgment. At that time, First Virginia could not garnish Ms. Randolph's wages because no authority existed for garnishment actions involving federal employees.

As part of the Hatch Act Reform Amendments of 1993, Congress enacted 5 U.S.C. § 5520a, which for the first time allowed garnishment of federal employees' wages. In 1994, First Virginia revived its judgment against Ms. Randolph. A Writ of Attachment on a Judgment (Garnishment of Wages, Earnings, Salary, Commissions and Pensions) was issued by the Superior Court of the District of Columbia and served on the government on February 14, 1994. However, the government did not begin withholding from Ms. Randolph's pay until March 31, 1994.

By August 17, 1994, Ms. Randolph had learned that she was eligible for an early retirement program, considered and applied for that program, and had her application approved. Her last day of work was November 23, 1994, but she was not deemed retired until December 30 of that year. However, on November 21, 1994, Ms. Randolph moved to quash the writ of garnishment and notified the government of her motion. Without waiting for the court to rule on Ms. Randolph's motion, the government stopped garnishing her wages. It is undisputed that the government was wrong in doing so.

On January 19, 1995, Ms. Randolph received a final paycheck in the amount of $17,563.50--several times the balance due First Virginia at the time. Shortly thereafter, when First Virginia informed the government of its error in ceasing withholding, the government replied that it owed no more pay to Ms. Randolph and thus had nothing left to withhold for payment to First Virginia.

On April 28, 1995, First Virginia filed a Motion for Judgment of Recovery against the government. This motion was filed in the already-pending action in the Superior Court of the District of Columbia, the same action in which the writ of garnishment had issued. The government responded on May 15, 1995, by removing the case to the United States District Court for the District of Columbia under 28 U.S.C. § 1442(a)(1). As the Court of Appeals subsequently determined, *see* App. at 7a, because First Virginia's claim against the government arose under 5 U.S.C. § 5520a, the District Court also had jurisdiction pursuant to 28 U.S.C. § 1331.

After cross-motions for summary judgment, the District Court granted summary judgment to First Virginia on March 29, 1996. The District Court determined that the government had wrongfully ceased garnishing Ms. Randolph's pay, App. 17a-20a, and that therefore, pursuant to D.C. Code Ann. § 16-575 (1989), the government was liable to First Virginia. App. 20a-21a. The District Court also rejected the government's sovereign immunity defense, relying on § 5520a's mandate that federal employers be treated "as if the agency were a private person" and the unquestionable liability of a private employer under the same circumstances. App. 22a-23a. The District Court also relied on similar results obtained under 42 U.S.C. § 659--the statute which was the paradigm for § 5520a. App. 23a-25a.

The Court of Appeals reversed the District Court. After considering its jurisdiction, the Court of Appeals interpreted § 5520a to reach nothing more than the "pay" of federal employees. App. 8a. The Court of Appeals reasoned that only this pay was subject to "legal process," and only if the process was "in the nature of a garnishment." It then held that First Virginia's Motion for Judgment of Recovery

Against Garnishee was new and different legal process which was not a part of the original garnishment, and thus unauthorized under § 5520a. App. 8a-9a. The Court of Appeals also viewed its opinion as consistent with a decision of the Eleventh Circuit interpreting § 659. App. 10a-11a.

REASONS FOR GRANTING THE WRIT

The decision of the Court of Appeals conflicts with pertinent precedent of this Court and that of another federal circuit court of appeals. In the process, the Court of Appeals relied on a faulty premise in creating a novel interpretation of federal law that conflicts with established principles and precedent of this Court. It also decided an important question of federal law in a manner that could have dire consequences for the collection of child support payments.

I. THE COURT OF APPEALS' DECISION CONFLICTS WITH DIRECTLY APPLICABLE PRECEDENT.

While the decision of the Court of Appeals is the only known interpretation of 5 U.S.C. § 5520a, that section is not a novel statute. Rather, § 5520a is expressly modeled on 42 U.S.C. § 659, which provides for garnishment of federal employees' pay for child support obligations. Even the language of these two statutes is nearly identical, as are their implementing regulations. Decisions under § 659 therefore apply to § 5520a.

Section 659 was construed in *United States v. Morton,* 467 U.S. 822 (1984). There, this Court said,

> The legislative history, as well as the plain language of § 659(a), indicates that Congress intended the

> Government to receive the same treatment as a private employer with respect to garnishment orders.

Id. at 831. The Court went on to say that "to adopt a different standard for liability than would be applicable to a private employer . . . . is foreclosed by the statute and its legislative history." *Id.* at 833.

However, in the present case, the Court of Appeals has *expressly* adopted a different standard for the government. Had a private employer erroneously failed to withhold part of an employee's wages, as it is conceded the government did here, it would clearly be liable. Therefore, the Court of Appeals' decision in this matter directly contradicts *Morton*.

The Court of Appeals' opinion is also at odds with the Eleventh Circuit's interpretation of § 659 in *Loftin v. Rush*, 767 F.2d 800 (11th Cir. 1985). While the Court of Appeals expressly deemed its opinion as harmonious with *Loftin*, it is not. *Loftin* limited judgments against the United States for errors in handling garnishments, but that limitation applied only to "any amount *in excess* of that owed [by the government] to the judgment debtor/employee at the time of the garnishment." *Id.* at 808 (emphasis added). The District Court's judgment in the instant matter was well within this parameter. Further, the result in *Loftin* was inconsistent with the decision of the Court of Appeals, because in *Loftin* the Eleventh Circuit held the government liable for amounts it should have, but did not, withhold. *Id.* at 810.[1]

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[1]There are five cases decided by lower federal tribunals which found the government responsible for its failure to withhold under § 659. *DeTienne v. DeTienne*, 815 F. Supp. 394 (D. Kan. 1993); *Young v. Young*, 547 F. Supp. 1 (W.D. Tenn. 1980); *In re Mathews*, 61 Comp. Gen. 229 (1982); *In re Bailey*, 56 Comp. Gen. 593 (1977); *In re*

In reaching its conclusion in *Loftin*, the Eleventh Circuit expressly deferred to regulations implementing § 659(a). *Id.* at 807, n.12. Those regulations make the government liable for amounts it mistakenly fails to withhold from the pay of the federal employee. 5 C.F.R. § 581.305(e) (1996). An identical provision appears in the regulations for § 5520a. 5 C.F.R. § 582.305(g) (1996). However, in the instant matter the Court of Appeals ignored this corresponding regulation.

By misconstruing *Loftin* and ignoring the other precedent under § 659, the Court of Appeals violated this Court's precedents governing statutory construction. The principles announced by this Court dictate that § 5520a should have the same meaning as § 659. *Miles v. Apex Marine Corp.*, 498 U.S. 19, 32 (1990). Similarly, all known interpretations of § 659 predate passage of § 5520a. "[W]here, as here, Congress adopts a new law incorporating sections of a prior law, Congress normally can be presumed to have knowledge of the interpretation given to the incorporated law . . . ." *Lorillard v. Pons*, 434 U.S. 575, 581 (1978). The passage of § 5520a ratified the interpretations given § 659 and made them part of § 5520a, and so the Court of Appeals' decision is in error.

II. THE COURT OF APPEALS MISCONSTRUED A FUNDAMENTAL STATUTORY TERM AND LEGAL CONCEPT.

The linchpin of the Court of Appeals' decision is its characterization of First Virginia's Motion for Judgment of Recovery Against Garnishee as a separate "damage action." The opinion states that this request for relief was "not 'in the

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Washington, 55 Comp. Gen. 517 (1975). This comprises most of the authority on this issue.

nature of a garnishment'" and thus not "legal process," as defined in § 5520a. App. 9a. However, that opinion also twice recognizes that First Virginia's request for relief against the government was by motion. App. 3a, 8a. A motion is not process, and so the Court of Appeals' decision rests on a faulty premise.

The Court of Appeals' premise is contrary to both the plain language of the statute and essential legal concepts. 5 U.S.C. § 5520a(a)(3)(A) defines "legal process" as a "writ, order, summons, or similar process." "The word 'process,' however, as now commonly understood, refers to a summons, or, summons and complaint, and, less commonly, to a writ." *Black's Law Dictionary* 1205 (6th ed. 1990). The only "legal process" in this matter was the original writ of garnishment.

First Virginia's Motion for Judgment of Recovery Against Garnishee was merely ancillary to, and in aid of, the original writ. No new process had to be issued. The government was already before the court pursuant to the original writ. The motion was filed in the same case and had the same case number as the original writ. The decision to award First Virginia amounts which the government wrongfully failed to withhold from Ms. Randolph's pay was thus not a new or different proceeding.

In fact, the District Court's award against the government was contemplated in the original writ of garnishment. This original writ on its face warned the government: "NOTICE TO EMPLOYER-GARNISHEE: . . . judgment may be entered against you for the entire amount of the plaintiff's claims with interest and costs." Thus, the original writ contemplated recovery from the government for its actions pursuant to the writ. The District Court's judgment for First

Virginia was thus part of the very "legal process" to which the government was made subject by § 5520a.

III. THE COURT OF APPEALS' DECISION IS INCONSISTENT WITH THIS COURT'S PRECEDENTS REGARDING OBEDIENCE OF COURT ORDERS.

The Court of Appeals' opinion also conflicts with this Court's precedent regarding the enforcement of judicial authority. Writs of garnishment are court orders. As this Court has said many times, it is axiomatic that all orders of courts must be complied with promptly, *see Maness v. Meyers*, 419 U.S. 449, 459 (1975), and that disobedience of a court order may be punished. "There can be no question that courts have inherent power to enforce compliance with their lawful orders through civil contempt." *Shillitani v. United States*, 384 U.S. 364, 370 (1966). Like any other court order, a writ of garnishment may be enforced by the court that issued it.

The power to punish disobedience of court orders includes imposing fines to compensate an injured party for losses resulting from the disobedience. *United States v. United Mine Workers*, 330 U.S. 258, 303-04 (1947). "The measure of the court's power in civil contempt proceedings is determined by the requirements of full remedial relief." *McComb v. Jacksonville Paper Co.*, 336 U.S. 187, 193 (1949). The District Court's judgment in the instant matter was consistent with these principles. First Virginia never sought, and was not awarded, any more than the balance on the debt owed it.

Further, the District Court's judgment did not involve a novel application of this judicial power. Numerous cases

have contemplated imposing a fine against the government while holding it in contempt. *Lander v. Morton*, 518 F.2d 1084, 1087 (D.C. Cir. 1975) (Department of the Interior); *Koyo Seiko Co., Ltd. v. United States*, 861 F. Supp. 79, 85 (Ct. Int'l Trade 1994) (Commerce Department) (subsequently modified, dismissed, and vacated in part, in numerous proceedings, but all on other grounds); *In re Tardiff*, 146 B.R. 499 (D. Maine 1992) (IRS); *In re Kiker*, 98 B.R. 103 (Bankr. N.D. Ga. 1988) (same); *Benford v. American Broadcasting Corp.*, 565 F. Supp. 139 (D. Md. 1983) (Clerk of the House of Representatives), *rev'd on other grounds sub nom. In re Guthrie*, 733 F.2d 634 (4th Cir. 1984); *cf. United States v. Norton*, 717 F.2d 767, 774 (3d Cir. 1983) (IRS); *Armstrong v. Executive Office of the President*, 821 F. Supp. 761 (D.D.C. 1993).

Thus, while the District Court's award to First Virginia was authorized by § 5520a, it was likewise consistent with the court's inherent ability to address the government's disregard of the mandate of the writ of garnishment. The government was made subject to such writs by § 5520a. The Court of Appeals' opinion therefore contravenes not only § 5520a, but also this Court's precedent regarding judicial authority and the vindication of that authority.

IV. THE COURT OF APPEALS' DECISION IS INCONSISTENT WITH PRINCIPLES OF GOVERNMENT ACCOUNTABILITY.

The Court of Appeals' opinion also conflicts with this Court's precedent regarding the accountability of the government when it fails to honor its obligations. Likewise, it is inconsistent with this Court's analysis of the effect of garnishment. These precedents coalesce in this case because § 5520a makes the government subject to garnishments "in

the same manner and to the same extent as if the agency were a private person."

A garnishment writ directs an employer to pay money to a third person, a judgment creditor. Here, the writ imposed an obligation on the government to make payments to First Virginia. "[I]f an agency has a legal obligation to pay money to a party, that duty does not disappear simply because the money was paid in error to the wrong person." *Aetna Casualty & Surety Co. v. United States*, 71 F.3d 475, 479 (2nd Cir. 1995). Where the government fails to fulfill its obligation to make monetary payments, the aggrieved party has a right of action against the government. *Bowen v. Massachusetts*, 487 U.S. 879 (1988). Such actions are not in the nature of a claim for monetary damages. *Id.* Therefore, the Court of Appeals erred both in characterizing First Virginia's Motion for Judgment of Recovery Against Garnishee as an action for damages and in revoking the relief the District Court had granted First Virginia.

As this Court held over 125 years ago, "Garnishment almost everywhere exists. . . . It arrests the property in hands of the garnishee . . .and, therefore, has the effect of a seizure." *Miller v. United States*, 78 U.S. 268, 297 (1871) (seizure can be had simply by serving writ; this places property in the court's jurisdiction). Garnishment is generally regarded as divesting the debtor of title to the garnished funds, and charging the garnishee with the preservation of those funds. *See In re Coppie*, 728 F.2d 951, 952-53 (7th Cir. 1984), *cert. denied*, 469 U.S. 1105 (1985); *In re Connor*, 733 F.2d 1560, 1562 (11th Cir. 1984). Thus, the Court of Appeals' decision effectively sanctions an unauthorized taking of private property by the government.

The liability of private employers for mishandling a

garnishment is a common feature of state garnishment schemes. In passing § 5520a, Congress made the government subject to these state garnishment schemes. Where Congress makes state law applicable to federal interests, liabilities under state law are equally applicable to the federal interests affected. *Goodyear Atomic Corp. v. Miller*, 486 U.S. 174, 184-85 (1988). Therefore, the government should be held responsible here, and the Court of Appeals erred.

This conclusion is bolstered by both the language of § 5520a and its legislative history. The statute mandates that federal agencies be subject to garnishment writs "in the same manner and to the same extent as if the agency were a private person." 5 U.S.C. § 5520a(b). The legislative history of § 5520a is replete with pronouncements that the purpose of the statute is to subject federal employees to the same garnishment rules and processes as their counterparts in the private sector. *See, e.g.*, Senate Comm. on Gov't Affairs, S. Rep. No. 103-57, 103d Cong. 1st Sess. (1993), reprinted in 1993 U.S.C.C.A.N. 1802, 1807-10, 1843; *The Garnishment Equalization Act of 1991; Hearings on S.316 Before the Subcomm. on Fed. Serv., Post Office, and Civil Serv. of the Senate Comm. on Gov't Affairs*, 102d Cong. 3, 35, 37, 44, 54 (1992).

To assure the efficient and effective handling of garnishment writs, those writs hold private employers liable for failure to comply with the writs' terms. Section 5520a requires nothing less of federal employers.

V. THE COURT OF APPEALS' DECISION COULD HAVE DIRE CONSEQUENCES TO CHILDREN ENTITLED TO SUPPORT.

The similarity of § 659 and § 5520a suggests that the Court of Appeals' decision may be applied in cases arising under § 659. This will deprive children of needed support when the government mishandles a federal employee's child support garnishment. *See* App. at 48a. The effect will be great, even if no other circuit follows this precedent, because this decision is now law in the circuit which has the largest single concentration of federal employees of any circuit.

CONCLUSION

For the reasons stated, the petition for writ of certiorari should be granted.

Respectfully submitted,

MARK L. BOOZ
(Counsel of Record)
THOMAS P. JENNINGS
Attorneys for Petitioner
Suite 420
6400 Arlington Boulevard
Falls Church, Virginia 22042
(703) 241-3478